No. 3667

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

COLUMBIA & NEHALEM RIVER RAILROAD COMPANY,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court for the District of Oregon

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United States Attorney for Oregon.
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STATEMENT OF THE CASE

This is an action brought by the United States of America under the Act of Congress known as "An Act to promote the safety of employes and travelers upon railroads, by limiting the hours of service of employes thereon," known as the "Hours of Service Act," approved March 4, 1907 (34 Statutes at Large, page 1415). A complaint was filed in the United States District Court for the District of Oregon on the 3rd day of April, 1920 (Transcript, pp. 5-13), and the case came to trial on the 15th day of July, 1920. before the Honorable Robert S. Bean, District Judge, the parties having theretofore waived jury trial (Transcript, pp. 16, 17). On the 16th day of August, 1920, the Court filed Findings of Fact and Conclusions of Law, stating that the defendant was not engaged in interstate commerce, and so the plaintiff was not entitled to recover upon any of its causes of action, of which there were five, and on the same date judgment was filed in favor of the defendant (Transcript, pp. 23-27). The complaint alleged that on September 1, 1919, September 9, 1919, Novem-

ber 3, 1919, November 5, 1919, and November 15, 1919, the defendant corporation required and permitttd one J. G. Nash, a train dispatcher for the railroad, to remain on duty more than nine hours in the twenty-four hour period, covered by the said dates, and while on duty, to dispatch, report, transmit, receive and deliver orders, by use of the telephone, pertaining to and affecting the movement of trains engaged in interstate commerce (Transcript, pp. 5-13). The defendant is a logging railroad, lying entirely within the State of Oregon, being twenty-six miles in length. The evidence showed that on each of the dates mentioned in the complaint, the defendant had handled over its lines shipments of lumber and through freight which were destined for points outside of the State of Oregon, and also cars from other railroads were brought over defendant's lines, for the purpose of loading and reshipment to exterior points (Transcript, pp. 54, 55, 63-65). The general practice of the defendant railroad was to demand of the shippers, two shipping orders for each shipment destined for points beyond defendants' terminus, at Kerry, Oregon; one shipping order covering carriage of the freight from point of origin on defendant's lines to defendant's terminus, at Kerry; the second shipping order covering carriage

of freight over the lines of the Spokane, Portland & Seattle Railway, the only railroad which had physical contact with the lines of defendant, and connecting lines to the final destination. However, several shipping orders were introduced in evidence from defendant's files, showing the final destination not to be Kerry, but a point outside of the State of Oregon. But those shipping orders were made out in error by the shipper, and were accepted by agents of the defendant by mistake and inadvertence, as instructions had been issued, both to employes and shippers, as to the proper method of billing freight. The usual practice was to forward the two shipping orders, with the shipment, to defendant's offices, at Kerry, where defendant's agent would retain the shipping order designed for defendant and place the other shipping order in a box near the S. P. & S. station. The car was then detached from the train and placed on a spur of the S. P. & S., the load not having been disturbed nor changed from the original car to another. The freight conductor of the next east bound S. P. & S. train would then stop and, attaching the car to his train, pick up the shipping order and deliver both to the station agent at Clatskanie, the first station on the S. P. & S. line east of Kerry, for preparation

of the waybill (Transcript, pp. 56-58, 60-62). The S. P. & S. had no station agent at Kerry. The defendant railroad had no through rates or traffic arrangements with any other road, and no conventional agreement for the division of charges. It issued no bills of lading for carriage beyond its own line, and neither assumed, charged nor collected freight for carriage on other lines; nor did it receive or accept goods on through bills of lading from exterior points consigned to points on its line; nor did any per diem agreement covering the use of cars exist between the defendant and any other railroad, but, on the contrary, defendant paid demurrage on freight cars in the same manner as an ordinary shipper (Transcript, pp. 57, 71). The duties of the dispatcher included, not only the supervision of train movements, but also the sale of tickets for the passenger cars operated by defendant; which he did on different occasions after the completion of his duties as dispatcher (Transcript, p. 79). The President of the defendant corporation testified that he did not know that the dispatcher was on duty for periods exceeding nine hours, and was of the opinion that, though he spent longer than nine hours per day in his office, it was because he used the office not only

for business purposes, but also as a recreation room when he was off duty. He further testified that many of the orders given by the dispatcher were unnecessary, as the road is only twenty-six miles in length; has two passing tracks; and no regular freight train schedule is maintained (Transcript, pp. 74, 75). The defendant accepted all shipments from points on defendant's own lines to any destination, regardless of whether or not it was a point on defendant's line, a point within the State of Oregon, or outside the boundaries of the State. Defendant was a common carrier under the laws of the State of Oregon, having been incorporated as such. After the judgment of the Court had been entered, plaintiff requested the Court to make special Findings of Fact (an extension of time having been allowed by the Court for this purpose), covering the material issues of the case, for the reason that it contended that the Findings as made by the Court did not state the material issues of the case; were not sustained by the evidence; and were mere conclusions of law, which request the Court denied, and allowed an exception. (Transcript, pp. 30-36.)

The above, we believe, is a sufficient statement of the nature of the case. The errors complained of

by the plaintiff in error are all of them general in nature and regard the sufficiency of the Findings to support the judgment, and the failure of the evidence to sustain the Findings made by the Court.

SPECIFICATIONS OF ERROR

I.

The Court erred in making each of the Findings of Fact herein (pp. 24 and 25, Transcript of Record), for the reason that they are not sustained by the evidence adduced at the trial of the case (Assignments of Error, I to VI, inclusive, Trans. of Record, pp. 42 and 43).

II.

The Court erred in declining to make any of the Findings of Fact as requested by plaintiff, for the reason that, if the Court had made Findings of Fact relative to the points requested, the Findings would not have sustained judgment for the defendant, but, on the contrary, for the plaintiff. (Assignments of Error, XII to XXV, inclusive, Trans. of Record, pp. 44, 45 and 46).

III.

The Court erred in making each of the Findings of Fact herein, for the reason that they do not include

all of the material issues of the case, and are not, in fact, Findings of Fact, but mere conclusions of law, and, therefore, do not sustain the judgment. (Assignments of Error, VII to XI, inclusive, Trans. of Record, pp. 43 and 44.)

ARGUMENT

I.

For the purpose of argument, the first and second specifications of error may be considered together, for the reason that both specifications deal with the insufficiency of the evidence to support the Findings and judgment. For the convenience of the Court, in considering the argument, we, therefore, propose to separate it under the following headings:

1. Where a common carrier accepts a car of freight from a point on its own lines, the final destination of which is a point in another state, and delivers the said car to another carrier, the movement is in interstate commerce.

U. S. vs. Colorado & N. W. R. R., 157 Fed. 321; 15 L. R. A. (N. S.) 167; 13 Ann. Cas. 893.

Barrett vs. City of N. Y., 183 Fed. 793.

Ala. Gt. Southern Railway Co. vs. McFadden, 232 Fed. 1000.

McFadden vs. Ala. Gt. Southern R. R. Co., 241 Fed. 562.

U. S. vs. Chicago P. N. S. L. Railway Co., 143 Fed. 353.

Coe vs. Errol, 116 U. S. 517.

The Daniel Ball, 10 Wall. 557.

Chi. Mil. & St. P. R. R. Co. vs. State of Iowa, 233 U. S. 334.

Ohio R. R. Commision vs. Worthington, 225 U. S. 101.

In the case of United States versus Colorado and N. W. R. R., 157 Fed. 321, the Court said:

"Importation into one state from another is the indispensable element, the test of interstate commerce. Every part of every transportation of articles of commerce in a continuous passage from an inception in one state to a prescribed destination in another is a transaction in interstate commerce. Goods so carried never cease to be articles of interstate commerce from the time they are started on their passage in one state until their delivery at their destination in another is completed, and they there mingle with and become a part of the great mass of the property within the latter state. Their transporta-

tion never ceases to be a transaction of interstate commerce from its inception in one state until the delivery of the goods at their prescribed destination in the other, and everyone who participates in it, who carries the goods in any part of their continuous passage, unavoidably engages in interstate commerce."

In the case of Alabama Great Southern Railway Co. vs. McFadden, 232 Fed. 1000, the court made the following ruling:

"Where the cotton was shipped to a point within the state where the shipments originated and there compressed, from thence being carried to points without the state, the shipments to the point where the cotton was compressed were not intrastate commerce shipments, there being no change of ownership, but were part of an interstate shipment, and interstate rates should be charged; the mere fact that the cotton was not always billed to its ultimate destination until after compression not affecting the matter."

It will be seen from the above extracts, that Courts have held, even in more extreme cases than the one at bar, that the mere passage through the

hands of the carrier during a portion of the interstate journey, made the carrier unavoidably an interstate carrier. However, in the case at bar, the evidence shows that the cars of freight were not even disturbed, but were simply transferred to the lines of a connecting carrier without unloading and reloading, and thence shipped to their final destination.

2. A carrier cannot divest a shipment of its interstate character by compelling the shipper to accept one bill of lading over its own lines and a second bill of lading over the connecting lines.

U. S. vs. Colorado N. W. R. R., 157 Fed. 321; 15 L. R. A. (NS) 167; 13 Ann. Cas. 893.

McFadden vs. Ala. Gt. Southern R. R. Co., 241 Fed. 562.

U. S. vs. Phila. & R. Railway Co., 232 Fed. 946.

Southern Pacific Terminal Co. vs. Interstate Commerce Commission, 219 U. S. 498.

Ohio R. R. Commision vs. Worthington, 225 U. S. 101.

Cutting vs. Fla. Railway & Navigation Co., 46 Fed. 641.

Meyer vs. Id.

Brown vs. Id.

Central Trust Co. vs. Id.

Guaranty Trust & Safe Deposit Co. vs. Id.
U. S. vs. Southern Railway Co., 135 Fed. 122.
Texas & New Orleans R. R. Co. vs. Sabine Tram Co., 227 U. S. 111; 33 Sup. Ct. 229; 57 L. Ed. 442.

In the case of United States versus Colorado & N. W. Railroad Co., the defendant corporation, of Colorado, owned and operated a narrow gauge railroad, which consisted of a main line, about ten miles long, and two branches, each about eighteen miles in length. The entire railroad was within the State of Colorado. The defendant was a common carrier and it transported in one of its freight cars, from one of its termini where it had received it from the Union Pacific Railroad Co., to a station upon its line, a shipment of hardware which had been sent from Omaha, Nebraska. In the same car it carried three other shipments of goods from points without the state to destinations on its line. These shipments were not carried upon through bills of lading, but they were consigned and carried upon continuous passages from other points of origin outside the state, to their destinations on defendant's line. Each shipment was re-billed from the terminus of defendant to its final destination on defendant's line. In that case the Court held

that the railroad was engaged in interstate commerce, regardless of whether or not the goods traveled on through bills of lading.

In the case of Cutting vs. Fla. Railway & Nav. Co., et al., (46 Fed. 641) certain orange growers in Florida shipped their fruit from one point in that state to another point in the same state, consigned to their agent at the latter point for re-shipment, who immediately forwarded them to their destination in another state. It was held by the Court that the shipment from the growers to the forwarding agent was interstate commerce. The Court, in making this decision, quoted a decision of the Court in The Daniel Ball, 10 Wall. 567:

> "***for when a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulations of commerce."

In the case of United States vs. Southern Railway Co., 135 Fed. 122, a car loaded with coal, to be delivered to a consignee in another state was deemed by the Court to be used in moving interstate traffic by the railroad company which took it to the place of loading, although such company only undertook to deliver it to a connecting carrier within the same state.

In the case of Texas & N. O. R. R. Co. vs Sabine Tram Co., 227 U. S. 111, the Court said:

> "The essential character of the commerce, not its mere accidents, should determine."

It had been contended by counsel that the fact that separate bills of lading were delivered covering the shipment entirely within one state divested the shipment of its interstate character. Regarding this contention, the Court further said:

> "Once admit the principle and means will be afforded of evading the National control of foreign commerce from points in the interior of a state. There must be trans-shipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading the commerce will be given local character, though it be essentially foreign."

The conclusion of the Court in the above case was, that the device of separate bills of lading did not divest the shipment of its interstate character or foreign character, but that the essential nature of the transaction should be taken into consideration.

It will be seen by the above decisions that the character of the transaction is bound, not by the artificial device of separate bills of lading, but rather by the fact that the shipment, itself, is designed to be carried from one state to another. If it were the case that a carrier could relieve itself from federal supervision merely by demanding separate shipping orders and issuing separate bills of lading for the carriage of the shipment in each state, there would be no need of an Interstate Commerce Commission, for every carrier could easily evade the law by making out separate bills of lading from one state boundary line to the next boundary line, and so on, until the completion of the journey.

3. The fact that defendant had no joint agreements with connecting lines concerning division of rates, joint rates, interchange of cars, per diem agreement as to use of cars, routing of traffic, or any other agreement as to movement of shipments after leaving defendant's lines, does not divest shipments

of their interstate character if they are, in fact, a part of interstate commerce.

U. S. vs. Union Stock Yds.Co., 161 Fed. 919.
Union Stock Yds. Co., vs. U. S. 169 Fed. 404.
U. S. vs. Southern Railway Co., 135 Fed. 122.
U. S. vs. Colorado & N. W. R. R. Co., 157 Fed. 321.

In the case of United States versus Colorado & N. W. R. R. Co., cited above, the Court said:

> "This case presents a single question: Is a common carrier which operates a railroad entirely within a single state, and transports thereon articles of commerce shipped in continuous passages from places without the state to stations on its road, or from stations on its road to points without the state, free from any common control, management or arrangement with another carrier for a continuous carriage or shipment thereof, subject to the provisions of the Safety Appliance Act?"

The final conclusion of the Court was:

> "A common carrier which operates a railroad entirely within a single state and transports thereon articles of commerce shipped in continu-

ous passages from places without the state to stations on its road, or from stations on its road to points without the state, is subject to the provisions of the Safety Appliance Act, although it carries the property free from common control, management or arrangement with another carrier, for a continuous carriage or shipment of the goods."

The above case which was decided by the Circuit Court of appeals for the Eighth Circuit has been quoted in numerous decisions of the District Courts throughout the country. It will be seen after perusal of the above cited cases, that the intention of the carrier as evidenced by its agreement with other carriers does not determine the character of the transaction. If the goods or shipments are, in fact, a part of interstate commerce, the unwillingness of the carrier to engage in interstate traffic and attempted subterfuges, consisting of abstaining from such agreements and seeking to evade any consequences of its so engaging by means of technical devices, will avail it nothing.

4. The fact that the major portion of the carrier's freight consists of carriage of its own logs, is immaterial where it is, in fact, a common carrier and

accepts freight as a common carrier.

No cases are cited in this connection, for the reason that this statement is a logical sequence of the preceding statements. A carrier to be engaged in interstate commerce need not necessarily devote all of its time to interstate shipments, and a single shipment which was interstate in character would render the carrier an interstate carrier as far, at least, as that particular shipment is concerned.

5. Excess service is "required and permitted" within the meaning of the Hours of Service Act, whenever the officer or agent of the carrier fails to prohibit such service.

U. S. vs. Pittsburg, Cincinnati, Chicago & St. L. Railway Co., D. C. W. D. Pa. Decided September 8, 1920. (Not reported.)

O. W. R. & N. Co. vs. U. S. 223 Fed. 596.

Section 3 of the Hours of Service Act provides that excess service is required and permitted within the meaning of the Act, whenever the officer or agent of the carrier fails to prohibit such service. This section of the Act has been upheld in the above cited cases.

6. It is not necessary in order to render the carrier liable under this Act, that all of the excess time

spent by the employe in the performance of his duties should be devoted to the dispatching of interstate train movements.

U. S. vs. Atchison T. & S. F. Railway Co. District Court S. D. Cal. S. D. Nov. 3, 1920. (Not yet reported.)

Los Angeles & S. L. R. R. Co. vs. U. S. 213 Fed. 326.

Delano vs. U. S. 220 Fed. 635,636.

B. & O. R. Co. vs. Commerce Commission, 221 U. S. 612.

Missouri K. & T. R. Co. vs. U. S., 213 U. S. 112.

U. S. vs. Gt. N. R. Co., 206 Fed. 838.

In the case of Delano vs. United States, cited above, a train dispatcher had been employed by the defendant to perform the duties of train dispatcher, and also ticket seller. During the time in excess of nine hours, he had dispatched no trains, but had sold tickets. However, the Court in that case held that a violation of the Hours of Service Act had been committed, and in making this decision, the Court said:

"The evil to be cured did not come from the employe's selling tickets or doing work for other people when off duty, but from the power of the

carriers customarily exercised, to require their employes who were concerned with train movements, to do extra and over-time work."

In the light of the above decisions, it will be very apparent to the Court that the defendant's attempted excuse, consisting of the fact that the train dispatcher did not engage in the dispatching or movement of trains in excess of nine hours, but that the excess service, if any, consisted in selling tickets, would not be a valid defense for the violation of the Act. The purpose of this Act is not so much to prevent one person from dispatching trains for a longer period than nine hours, but is aimed against the over-working of persons ordinarily engaged in superintending or dispatching the movements of trains—whether they be engaged in dispatching or in any other duties.

7. The office maintained by defendant at Kerry was operated continuously night and day within the meaning of the Hours of Service Act.

U. S. vs. B. & M. R. R., 269 Fed. 89.

U. S. vs. Atlantic Coast Line R. Co., 211 Fed. 897.

U. S. vs. Grand Rapids & I. Railway Co., 224 Fed. 667.

U. S. vs. Atchison, 220 U. S. 37, 44.

U. S. vs. Cornwall & Lebanon R. R. Co., 268 Fed. 680.

The above cases furnish concrete examples of offices operated continuously night and day, within the meaning of this Act. It is a universal ruling of the Courts that the phrase "operated continuously night and day," does not necessarily mean an office open twenty-four hours at a time, but simply one that is operated in the daytime and in the night time, using the words in their ordinary significance.

It will be seen from the Findings of Fact actually filed by the Court herein that the Court decided that the defendant did not come within the purview of the Hours of Service Act for the reason that it was not an interstate carrier. The other elements of an offense against the Act are entirely ignored, both in the Findings and in the opinion filed by the Court. In its decision, the Court has ignored the decisions cited above and has decided that the defendant is not engaged in interstate commerce for the reason that since the entire traffic of the road consisted of logs and lumber products which were hauled by defendant directly from the camps where they were prepared, that the case comes under the decision ren-

dered in Coe vs. Errol, cited above, on the ground that the Court in that case said that an interstate movement does not begin while the product is being transported from the farm or forest to the depot. In the case at bar, the products had already been hauled from the forest to the carrier before they ever came into defendant's possession. The goods were first loaded into cars, were then assembled into a train on defendant's lines, and bill of lading was issued by defendant upon the hauling of the goods. In the case of Coe vs. Errol, the product referred to consisted of logs that had been hauled from the spot where they were felled, and left on the bank of a stream, waiting for the flood season in order to float them down the stream into another state. We respectfully submit that the two cases are not in the least parallel; otherwise, following the Court's reasoning, the logs hauled by defendant would still be deemed en route from the forest to the depot until they reached their final destination, because the defendant observed every formality that any of the connecting carriers observed.

The plaintiff afterwards submitted a request for Findings of Fact upon certain points. If the Court had made Findings covering those points, he would

have covered the material issues of the case, which were:

First—Whether or not the defendant was engaged in interstate commerce, and was an interstate carrier on the dates in question.

Second—Whether the dispatcher was required or permitted to remain on duty longer than nine hours in any one day on said dates.

Third—Whether, while he was on duty, he was engaged in the dispatching of trains carrying interstate shipments on said dates.

But the Findings actually made by the Court did not cover the gist of the action, they merely touched upon one point involved, and the Findings, themselves, were not supported by the evidence.

There can be no doubt, whatever, but that the defendant, whether it wished to do so or not, was on the dates in dispute engaged in interstate commerce, in that it hauled shipments that were destined for points outside the State of Oregon; that the journey was continuous, as the cars were allowed to remain as they were originally loaded and were delivered by defendant to a side-track of a connecting carrier, and were picked up by the next train of the connecting

carrier which passed the point.

There can be no doubt, after a perusal of the Findings adduced at the trial and an examination of the rulings made by other Courts in similar cases, that the decision of the Court in the case at bar was an arbitrary one, which was not sustained by the evidence and which was contrary to law.

II.

It is further contended by plaintiff that the Court erred in making each of the Findings of Fact, for the reason that they do not include all of the material issues of the case and are not, in fact, Findings of Fact, but are mere conclusions of law, and, therefore, do not sustain the judgment.

This specification, though it is set forth in the Assignments of Error, was not included in the Bill of Exceptions, no exception having been taken to the Findings of Fact at the time. But the point need not be raised by Bill of Exceptions in order to bring it to the consideration of this Court. Section 172, Oregon Laws, provides:

> "The statement of the exception when settled and allowed shall be signed by the judge and filed with the clerk, and thereafter it shall be

deemed and taken to be a part of the record of the cause. No exception need be taken or allowed to any decision upon a matter of law when the same is entered upon the journal or made wholly upon matters in writing and on file in the Court."

In the case of Nelson vs. U. S., 30 Fed. 112, the demurrer in a criminal case was overruled by the trial Court, and when the matter came up on writ of error, it was found that the Bill of Exceptions contained only the exception taken by the defendant to the order of the Court overruling the demurrer.

Judge Deady, in rendering his decision, said:

"The office of a Bill of Exceptions is only to reduce to writing and put on record some action of the Court involving a question of law, as the admission or rejection of evidence, or a direction to the jury, that ordinarily transpires in pais, and to which the party obtaining the same took exception at the time. But an act of the Court such as an order or judgment, which in the due and usual course of procedure is entered in its record, need not be excepted to by the party against whom the same was made or given, and, therefore, is not the subject of a bill of excep-

tions."

In the case of Chung vs. Stephenson, 50 Ore. 247, 89 Pac. 386, 805, the Court said:

> "Where the error appears from the record, namely, the pleadings and the findings, and does not depend upon a Bill of Exceptions to disclose it, it may be reviewed on appeal, though no exception was taken."

The Court further said:

> "It is claimed on this motion that the failure of the lower court to find upon the defendant's counterclaim for damages was not excepted to in the lower court, and cannot be reviewed here although assigned as error. This question was not suggested at the argument, but the findings in a law action are entered in the journal and, with the pleadings, is part of the judgment roll; and if any error of the court below is disclosed therefrom, it may be relied upon by this Court without an exception thereto."

Other cases sustaining this view are:

McPheeters vs. Smith, 85 Ore. 597.

Tyner vs. Gapin, 3 Blackf. 372.

State vs. Drake, 11. Ore. 396; 4 Pac. 1204.

State vs. McGinnis, 17 Ore. 333; 20 Pac. 632.

State vs. Chee Gong, 17 Ore. 635, 21 Pac. 882.

State vs. Cody, 18 Ore. 535, 23 Pac. 891; 24 Pac. 895.

Kapischka vs. Tillamook Hotel Co., 86 Ore. 499; 168 Pac. 938.

Moody vs. Richards, 29 Ore. 282, 45 Pac. 777.

It will be seen from the above decisions that the purpose of a Bill of Exceptions is to place before the Appellate Court all matters which would not appear in the judgment roll. In the case at bar, the Court now has before it the complaint and the Findings of Fact. It is simply upon the face of the record that the plaintiff in error is relying. The complaint sets forth five causes of action, each cause of action involving several material issues, the issues being:

First—Whether or not the Railroad was engaged in interstate commerce on the dates in question;

Second—Whether or not the train dispatcher was permitted upon those dates to be at his post longer than nine hours out of twenty-four hours; and

Third—Whether during the time he was so on duty he directed the movements of trains con-

taining interstate shipments.

But the Findings of Fact as made by the Court simply define and decide one of the material issues for each cause of action.

It is further contended by plaintiff in error that the Findings of Fact as made by the Court do not include the material issues and, for that reason, do not support the judgment.

Moody vs. Richards, 29 Ore. 282-285; 45 Pac. 777.

Fink vs. Canyon Road Co., 5 Ore. 301-310.

Drainage Dist. vs. Crow, 20 Ore. 535-537; 26 Pac. 845-846.

Dowd vs. Clark, 51 Cal. 262.

Pengra vs. Wheeler, 24 Ore. 532-538; 34 Pac. 354; 21 L. R. A. 726.

Jameson vs. Coldwell, 25 Ore. 199; 35 Pac. 245.

Breding vs. Williams, 33 Ore. 393; 54 Pac. 206.

Lewis vs. Bank, 46 Ore. 187; 78 Pac. 990.

In the case of Moody vs. Richards, cited above, the trial court had failed to find certain facts, and, therefore, defendant's counsel contended that the findings did not support the judgment, and plaintiff's counsel insisted that no request having been made for more specific findings, the judgment was not

subject to review on appeal. In this connection the Court said:

> "The right to a trial by jury may be waived by the parties to an action and the issue of fact tried by the Court which must state the facts found, and this finding shall be deemed as a verdict and upon being filed with the clerk during the term or within twenty days thereafter, judgment may be entered thereon. If the statement be considered as a general verdict, it must be presumed that every material issue raised by the pleadings has been passed upon. (Shmit vs. Day, 27 Ore. 110; 39 Pac. 870.) But Judge Thompson in his work on Trials, Section 2658, in speaking on this subject, says: 'Such a finding of fact is in the nature of a special verdict and its sufficiency is determined by the same rules.' The statute making it incumbent upon the Court to state the facts found, the consent of a party to submit his cause for trial without the intervention of a jury must be construed as a request for a special verdict, which necessitates a finding upon all the material issues involved in the action . . . It is true the defendant did not request the Court to make more specific

findings, nor do we think it was incumbent upon him to do so, for if a request were essential to obtain a statement of facts found upon the material issues, it would necessarily follow that without such request the Court could disregard the plain provisions of the statute and refuse to make any statement of its findings. . . . The complaint having alleged an express promise to repay, the issue in question became material and the finding thereon indispensible without any request therefor. Aside from the agreement to submit the cause for trial by the Court without the intervention of a jury, and the Court having failed to make such finding of fact, no foundation was laid upon which the judgment could rest, and, hence, it is reversed and a new trial ordered."

In the case of Chung vs. Stephenson, cited above, the Court said:

"Also there must be findings of fact to sustain the judgment. The rule is well settled that all material issues must be passed upon. Fink vs. Canyon Road Co., 5 Ore. 301-310. It is said in Drainage District vs. Crow, 'Where a cause is tried by the Court without the intervention of

a jury, there must be findings of fact sufficient to sustain the judgment. All of the material issues should be passed upon. . . . In Dowd vs. Clarke, 51 Cal. 262, it was held that a judgment could not stand unless there were full findings which respond to all the material issues made by the pleadings.' In that case there was no Bill of Exceptions and, hence, no exceptions, and the cause was reversed because the findings did not support the judgment. In Pengra vs. Wheeler, 24 Ore. 532-538; 34 Pac. 354; 21 L. R. A. 726, where the omission of the Court to find upon a counterclaim for damages was assigned as error, Drainage District vs. Crow was cited with approval, and Mr. Justice Moore says: 'The law is well settled in this state that when a cause is tried by Court without the intervention of a jury, there must be findings of fact upon all the material issues presented by the pleadings. There being no finding upon this issue, it must be presumed that it escaped the attention of the Court.' "

Both of these cases are cited with approval in Jameson vs. Coldwell, 25 Ore. 199-205; 35 Pac. 245. To the same effect are Breding vs. Williams, 33 Ore.

393; 54 Pac. 206, and Lewis vs. Bank 46 Ore. 187; 78 Pac. 990. Therefore, we conclude that the question was properly before the Court.

It is further contended that the Findings of Fact as made by the Court are not, in fact, Findings of Fact, but are in reality mere conclusions of law.

Kane vs. Rippey, 22 Ore. 299; 29 Pac. 1005.

In the above cited case, the Court made Findings of Fact that an abstract furnished by defendant to plaintiff does not show any legal defect or encumbrances, and there are none in fact. The Court, therefore, finds as a conclusion of law, that the plaintiff is not entitled to recovery in the action, and that defendants are entitled to recover costs. The Supreme Court of the State of Oregon, in making its decision, said:

> "The seventh finding recites that the title is good, and the eighth that the abstract furnished to plaintiff does not show any legal defects or encumbrances and there are none in fact. These are not findings of fact but naked legal conclusions. The Court cannot deduce from them any legal consequences, because they are in themselves legal conclusions. What deeds there are

in the chain of title and the manner and form of their execution are questions of fact. Whether or not they vest in the defendant a good title is a question of law. What was contained in the abstract is a question of fact. Whether those facts showed any legal defects or encumbrances are questions of law. These principles are so elementary that they need no citations of authority to fortify them. From the record before us, it is impossible to determine upon what legal theory the Court below proceeded in the trial, but it is manifest that proper attention was not given to the former opinion of the Court in this cause. For that reason and because the findings of fact are entirely defective and insufficient to justify the judgment rendered, the same must be reversed."

The record in itself shows what issues were before the Court, and what findings the Court made upon the issues. The Court utterly ignored all of the material issues in the case except one, which was whether or not the defendant was at any time engaged in interstate commerce. For that reason, as shown by the cases cited above, the judgment is defective because there are no Findings of Fact from which a conclusion of law may be drawn. The record

does not show any decision by the Court upon the other material issues of the case.

The plaintiff in error does not seek to reverse this case for any technical errors, if any there may be, committed during the course of the trial of the cause, but, on the contrary, seeks merely a judgment in the case to be determined by the evidence, by sufficient findings, and by the law. In each of those particulars, we are of the opinion that the trial court has failed to render a just judgment and the error is not one that can be particularized and which rests upon mere technicalities, but it underlies the entire judgment of the Court. The Court in making its decision cited but one case, which the plaintiff in error contends was not in point and could not be used to determine the issues of the case, and has ignored numbers of decisions which would support a judgment for the plaintiff.

For the reasons hereinabove set forth, we respectfully urge that the judgment ought to be reversed and remanded for a new trial.

Respectfully submitted,

LESTER W. HUMPHREYS,
United States Attorney for Oregon.

THOS. H. MAGUIRE,
Assistant United States Attorney
for Oregon.